



1 of Appeal. Docket No. 18, Exh. 3. On August 23, 2011, the  
2 California Court of Appeal filed an unpublished opinion affirming  
3 the judgment. People v. King, No. A129911, 2011 WL 3686461 (Cal.  
4 Ct. App. August 23, 2011). On November 2, 2011, the California  
5 Supreme Court denied Petitioner's petition for review. Docket No. 1  
6 at 37.

7 On October 3, 2012, Petitioner filed the instant federal  
8 petition. On July 18, 2013, this Court granted Respondent's motion  
9 to dismiss the unexhausted claims and ordered Respondent to show  
10 cause as to why the petition should not be granted on the one  
11 remaining claim. Respondent filed an answer; Petitioner has not  
12 filed a traverse.

13 II

14 The following factual background is taken from the order  
15 of the California Court of Appeal.

16 A.H. was born in December 1991. When she was 4 years old,  
17 it appears that her mother and appellant Klinton Michael  
18 King began living together, and he stepped into the role  
19 of step-father to the girl. A.H.'s mother was an  
20 alcoholic and the relationship between the two adults was  
21 stressful. In December 2009, A.H. turned 18 years old.

22 In January 2010, the Lake County Sheriff's Office received  
23 a report that King may have molested A.H.<sup>2</sup> When A.H. was  
24 interviewed, she confirmed that she had been molested over  
25 a two-year period beginning when she was 12 years old.  
26 The molestation included genital touching, oral  
27 copulation, and both attempted and completed vaginal  
28 intercourse. The most serious incidents occurred when  
A.H.'s mother was incarcerated.

Fn 2: As there was no preliminary hearing or trial in  
this matter, we rely on the probation report's  
summary of the underlying offenses.

On February 2, 2010, a complaint was filed alleging that  
King had committed seven sexual offenses involving a  
single child under age 14. The complaint alleged that in

1 October 2004, he committed three lewd and lascivious acts  
2 on a child under age 14. (Former § 288, subd. (a).) It  
3 also alleged that King committed a fourth lewd act, rape,  
4 oral copulation and sodomy against that child during the  
5 following year. (See §§ 261, subd. (a)(2), (6), 286,  
subd. (c)(1), 288, subd. (a), 288a, subd. (c)(1).) The  
following day, the trial court issued a criminal  
protective order, barring King from having any contact  
with A.H. (§ 136.2.)

6 Initially, King pled not guilty to all counts. In April  
7 2010, he pled guilty to two counts of lewd and lascivious  
8 acts on a child alleged to have been committed in October  
9 2004. (Former § 288, subd.(a).) In a written plea form,  
10 King pled guilty to these two charges. He acknowledged  
11 that he was subject to a maximum term of 10 years in state  
12 prison for them, that both were serious felonies, and that  
13 he would be required to register as a sex offender. He  
waived his right to a preliminary hearing. Citing  
sections 288.1 and 1203.067,<sup>3</sup> he also stated his  
understanding that he would not be granted probation  
unless the court found at the time of sentencing that his  
was an unusual case in which the interests of justice  
would be best served by a grant of probation. On the  
People's motion, the remaining charges were dismissed.

14 Fn 3: These provisions require the trial court to  
15 obtain a psychiatric report and a diagnostic report  
16 from the Department of Corrections before granting  
probation to a person convicted of lewd conduct with  
a child under age 14. (§§ 288.1, 1203.067, subd.  
(a).)

17 King was referred for a diagnostic evaluation at the  
18 Department of Corrections. (§ 1203.03.) He was also  
19 evaluated by a court-appointed psychiatrist. (§ 288.1.)  
20 The trial court advised King that he would not be granted  
probation unless both of these reports were favorable. In  
his interviews with these evaluators, King denied  
committing the acts to which he pled guilty. During his  
21 evaluation by the Department of Corrections, King was  
22 found with several photographs of the victim and several  
letters from her, as well as a photograph of himself with  
a small girl lying on a couch together.

23 The Department of Corrections reporters characterized King  
24 as a risk to society and a poor candidate for probation.  
25 The evaluators recommended that King be sentenced to  
prison. A Ukiah psychiatrist concluded that because King  
26 failed to accept responsibility for the offenses he had  
admitted in his guilty plea, he remained at risk to  
27 reoffend and would not be amenable to treatment. The  
substantial nature of the sexual conduct and King's denial

1 of his part in it prompted the psychiatrist to recommend  
2 against a grant of probation.

3 The probation report indicated that King was eligible for  
4 probation, but recommended that he be sentenced to state  
5 prison for eight years. The report proposed the  
6 imposition of various restitution, fees and fines,  
7 including a \$300 sex offender fine. (§ 290.3.) A ban on  
8 contact with the victim was also recommended.

9 A.H.'s mother died in July 2010. At the August 2010  
10 sentencing, King's counsel acknowledged that the  
11 Department of Corrections diagnostic evaluation was "very  
12 unfavorable." Still, King sought a grant of probation  
13 with A.H.'s support. The trial court agreed with the  
14 Department of Corrections, the psychiatrist, and the  
15 probation department that to grant King probation would be  
16 inappropriate. It cited numerous reasons for denying  
17 probation – the nature, seriousness and circumstances of  
18 the crime were more serious than other instances of the  
19 same offenses; the young age of the victim when the  
20 molestation began; the infliction of physical and  
21 emotional injury on the victim; King's active  
22 participation in the crimes; the taking advantage of a  
23 position of trust to commit the offenses; the taking  
24 advantage of the mother's absence to commit these crimes;  
25 and a poor ability to comply with reasonable terms of  
26 probation. The trial court also gauged the likely effect  
27 of imprisonment as moderate and found that King posed a  
28 substantial danger to others if not imprisoned.

King was sentenced to a total term of 10 years in state  
prison – an upper term of 8 years for one lewd act and a  
consecutive one-third upper term of 2 years for the second  
one. He was also ordered to pay a \$300 fine as a sex  
offender. (§ 290.3.) The trial court prohibited any  
visitation between King and A.H. (§ 1202.05.) King sought  
a certificate of probable cause to enable him to challenge  
the underlying plea on appeal, but the trial court denied  
the request.

22 People v. King, 2011 WL 3686461, at \*1 - \*3.

23 III

24 This Court may entertain a petition for a writ of habeas  
25 corpus "in behalf of a person in custody pursuant to the judgment of  
26 a State court only on the ground that he is in custody in violation  
27 of the Constitution or laws or treaties of the United States." 28

1 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975).

2           The Antiterrorism and Effective Death Penalty Act of 1996  
3 ("AEDPA") amended § 2254 to impose new restrictions on federal  
4 habeas review. A petition may not be granted with respect to any  
5 claim that was adjudicated on the merits in state court unless the  
6 state court's adjudication of the claim: "(1) resulted in a decision  
7 that was contrary to, or involved an unreasonable application of,  
8 clearly established Federal law, as determined by the Supreme Court  
9 of the United States; or (2) resulted in a decision that was based  
10 on an unreasonable determination of the facts in light of the  
11 evidence presented in the State court proceeding." 28 U.S.C. §  
12 2254(d).

13           "Under the 'contrary to' clause, a federal habeas court  
14 may grant the writ if the state court arrives at a conclusion  
15 opposite to that reached by [the Supreme] Court on a question of law  
16 or if the state court decides a case differently than [the] Court  
17 has on a set of materially indistinguishable facts." Williams  
18 (Terry) v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the  
19 'unreasonable application' clause, a federal habeas court may grant  
20 the writ if the state court identifies the correct governing legal  
21 principle from [the] Court's decisions but unreasonably applies that  
22 principle to the facts of the prisoner's case." Id. at 413.

23           "[A] federal habeas court may not issue the writ simply  
24 because that court concludes in its independent judgment that the  
25 relevant state-court decision applied clearly established federal  
26 law erroneously or incorrectly. Rather, that application must also  
27 be unreasonable." Id. at 411. A federal habeas court making the  
28

1 "unreasonable application" inquiry should ask whether the state  
2 court's application of clearly established federal law was  
3 "objectively unreasonable." Id. at 409. Moreover, in conducting  
4 its analysis, the federal court must presume the correctness of the  
5 state court's factual findings, and the petitioner bears the burden  
6 of rebutting that presumption by clear and convincing evidence. 28  
7 U.S.C. § 2254(e)(1). As the Court explained: "[o]n federal habeas  
8 review, AEDPA 'imposes a highly deferential standard for evaluating  
9 state-court rulings' and 'demands that state-court decisions be  
10 given the benefit of the doubt.'" Felkner v. Jackson, 131 S. Ct.  
11 1305, 1307 (2011).

12 Section 2254(d)(1) restricts the source of clearly  
13 established law to the Supreme Court's jurisprudence. "[C]learly  
14 established Federal law, as determined by the Supreme Court of the  
15 United States" refers to "the holdings, as opposed to the dicta, of  
16 [the Supreme] Court's decisions as of the time of the relevant  
17 state-court decision." Williams, 529 U.S. at 412. "A federal court  
18 may not overrule a state court for simply holding a view different  
19 from its own, when the precedent from [the Supreme Court] is, at  
20 best, ambiguous." Mitchell v. Esparza, 540 U.S. 12, 17 (2003).

21 When applying these standards, the federal court should  
22 review the "last reasoned decision" by the state courts. Avila v.  
23 Galaza, 297 F.3d 911, 918 n.6 (9th Cir. 2002). In this case, the  
24 last reasoned decision is the California Court of Appeal's August  
25 23, 2011, written opinion on direct appeal affirming the trial court  
26 judgment.

27 With these principles in mind regarding the standard and  
28

1 scope of review on federal habeas, the Court addresses Petitioner's  
2 claim.

3 IV

4 Petitioner claims that the trial court applied the  
5 probation eligibility law in effect at the time of Petitioner's 2010  
6 sentencing rather than the law that was in effect in 2004 when  
7 Petitioner's offenses occurred, in violation of the Ex Post Facto  
8 Clause.

9 The United States Constitution prohibits the federal  
10 government and the states from passing any "ex post facto Law."  
11 U.S. Const. art. I, § 9, cl. 3 (federal government); art. I, § 10,  
12 cl. 1 (states). These clauses prohibit the government from enacting  
13 laws with certain retroactive effects: any law that (1) makes an  
14 act criminal when the act was done before the passing of the law;  
15 (2) aggravates a crime or makes it greater than it was when it was  
16 committed; (3) changes the punishment and inflicts a greater  
17 punishment for the crime than the punishment authorized by law when  
18 the crime was committed; or (4) alters the legal rules of evidence  
19 and requires less or different testimony to convict the defendant  
20 than was required at the time the crime was committed. See Stogner  
21 v. California, 539 U.S. 607, 611-12 (2003) (citing Calder v. Bull, 3  
22 U.S. 386 (1798)). An ex post facto violation occurs only if there  
23 is a retroactive application of law that works to the defendant's  
24 detriment. Lynce v. Mathis, 519 U.S. 433, 441 (1997). "A law is  
25 retrospective if it 'changes the legal consequences of acts  
26 completed before its effective date.'" Miller v. Florida, 482 U.S.  
27 423, 430 (1987), overruled in part on other grounds by California

1 Dept. of Corr. v. Morales, 514 U.S. 499, 506, n. 3 (1995), (quoting  
2 Weaver v. Graham, 450 U.S. 24, 31 (1981)).

3           The state court denied Petitioner's claim, finding that  
4 there was no evidence that the trial court applied the 2010 version  
5 of the sentencing law rather than the 2004 version:

6           Finally, King seeks resentencing on two grounds. He  
7 first reasons that the trial court applied a statutory  
8 limitation on probation that had not been enacted at the  
9 time that he committed the charged offenses. He argues  
10 that this misapplication of statute violated the ban on  
11 ex post facto laws and requires a remand for  
12 reconsideration of his application for a grant of  
13 probation. At the time of sentencing, then-current  
14 statutory law banned a trial court from granting  
15 probation to those convicted of lewd conduct with a child  
16 if specified circumstances were pled, admitted or found  
17 true. (Former § 1203.066, subd. (a), (c)(1) [Stats.2006,  
18 ch. 538, § 506].) The specified circumstances were not  
19 alleged in the King complaint, were not admitted in his  
20 guilty plea and were not the subject of trial court  
21 findings. Under the 2010 statute, if these specified  
22 circumstances were not pled or proven, one convicted of  
23 lewd conduct with a child could be granted probation only  
24 if certain conditions were shown – conditions that do not  
25 appear to apply in King's case. (Former § 1203.066, subd.  
26 (a), (c)(1), (d)(1) [Stats.2006, ch. 538, § 506].) In  
27 2004 when the lewd conduct occurred, the law contained a  
28 similar ban on probation under specified circumstances,  
but also contained specified limitations on probation if  
those circumstances were not pled, admitted or found  
true. (See former § 1203.066, subd. (a), (d)  
[Stats.1997, ch. 817, § 13, pp. 5584-5587].)

On appeal, King reasons that the trial court applied the  
2010 version of this law, which contained greater limits  
on its discretion than the law that was in effect at the  
time that he committed the lewd conduct in 2004. This  
application of law violates the ban on ex post facto  
laws, he contends. In order for him to prevail on this  
claim of error, he must establish that the trial court  
applied the 2010 version of this statute, rather than the  
2004 version of it. On appeal, we must presume that the  
trial court applied the correct law. King must  
affirmatively demonstrate the error that he claims. (In  
re Julian R. (2009) 47 Cal.4th 487, 498-499; see Evid.  
Code, § 644.) He has not done so.

King notes that the psychiatrist referred to this

1 provision in his report and that his counsel spoke of  
2 limitations to the possibility of probation at  
3 sentencing, rather than an outright ban on probation. He  
4 reasons that these comments both refer to the 2010 law  
5 rather than the 2004 version of section 1203.066, but it  
6 is significant that the trial court did not refer to  
7 either of them.

8 Instead, the record supports our assumption that the  
9 trial court applied the correct version of the law. The  
10 probation report stated that the offenses were committed  
11 in 2004. That report twice stated expressly to the trial  
12 court that King was statutorily eligible for probation.  
13 It recommended that King be sentenced to prison, rather  
14 than granted probation, for a long list of reasons  
15 related to his conduct, not any statutory limitation on  
16 the trial court's discretion. When the court cited its  
17 many reasons why probation was to be denied, it did so  
18 because it found a grant of probation to be  
19 inappropriate. In listing the factors that entered into  
20 its decision, it made no reference to section 1203.066 or  
21 any limitation of its discretion to grant probation.  
22 None of these circumstances suggest that the trial court  
23 applied the then-current version of section 1203.066. As  
24 King has not proven the factual predicate that the trial  
25 court applied the 2010 version of section 1203.066 rather  
26 than the 2004 version, his ex post facto claim  
27 necessarily fails.  
28

People v. King, 2011 WL 3686461, at \*3-\*4.

29 The Court presumes correct the state court's determination  
30 of the factual issue of whether the state court applied the correct  
31 version of the sentencing law. 28 U.S.C. § 2254(e)(1) and Bragg v.  
32 Galaza, 242 F.3d 1082, 1087 (9th Cir.), amended, 253 F.3d 1150 (9th  
33 Cir. 2001) (citing Sumner v. Mata, 449 U.S. 539, 546-47 (1981))  
34 (presumption of correctness applies to findings made by both state  
35 trial courts and appeal courts). Petitioner has not presented any  
36 evidence rebutting this presumption, much less the clear and  
37 convincing evidence required by § 2254(e)(1). 28 U.S.C. §  
38 2254(e)(1) (requiring clear and convincing evidence to rebut the  
39 presumption of correctness).

Moreover, the appellate court's determination that the trial court had applied the 2004 parole eligibility law is supported by substantial evidence in the state court record. In denying parole, the trial court did not mention the 2010 parole eligibility law. Nor does the trial court indicate in any way that it believed that its discretion was limited. The denial of parole was based on other reasons, including the victim's youth at the time of the crime; Petitioner's active participation in the crime; Petitioner's abuse of his position of trust; the physical and emotional injury to the victim; Petitioner's likely inability to comply with the terms of probation; Petitioner's refusal to accept responsibility for his crime; and the moderate impact of incarceration on Petitioner. CT at 169-70.

Since Petitioner has failed to show that the state court retroactively applied a law, there is no *ex post facto* violation. Weaver, 450 U.S. at 29 ("two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.") (footnotes omitted); Lynce, 519 U.S. at 441. The state court denial of Petitioner's claim was a reasonable application of federal law to the facts of Petitioner's case. Habeas relief is denied on this claim.

v

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.


Further, a Certificate of Appealability is DENIED. See

1 Rule 11(a) of the Rules Governing Section 2254 Cases. Petitioner  
2 has not made "a substantial showing of the denial of a  
3 constitutional right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner  
4 demonstrated that "reasonable jurists would find the district  
5 court's assessment of the constitutional claims debatable or wrong."  
6 Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not  
7 appeal the denial of a Certificate of Appealability in this Court  
8 but may seek a certificate from the Court of Appeals under Rule 22  
9 of the Federal Rules of Appellate Procedure. See Rule 11(a) of the  
10 Rules Governing Section 2254 Cases.

11 The Clerk is directed to enter Judgment in favor of  
12 Respondent and against Petitioner, terminate any pending motions as  
13 moot and close the file.

14 IT IS SO ORDERED.

15  
16 DATED 02/17/2015

  
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THELTON E. HENDERSON  
United States District Judge

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